

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

August 30, 2006

In Reply Refer To:
Enbridge Offshore Pipeline (UTOS) L.L.C.
Docket No. RP06-453-000

Enbridge Offshore Pipeline (UTOS) LLC
1100 Louisiana, Suite 3300
Houston, TX 77002

Attention: Neal A. Gerstandt
Vice President, Regulatory Affairs

Reference: Tariff Sheets Implementing
Interactive Internet Website Agreement

Dear Mr. Gerstandt:

1. On July 31, 2006, Enbridge Offshore Pipeline (UTOS) L.L.C. (UTOS) filed revised tariff sheets as listed on the Appendix to replace its current *pro forma* License Agreement with a *pro forma* Interactive Internet Website Agreement (Website Agreement) to its FERC Gas Tariff, Third Revised Volume No. 1. UTOS requests an effective date of August 31, 2006. As discussed below, we accept the proposed tariff sheets for filing, subject to conditions, to become effective August 31, 2006, as proposed.

2. Notice of UTOS' filing was issued on August 3, 2006. Interventions and protests were due as provided in section 154.210 of the Commission's regulations, 18 C.F.R. § 154.210 (2006). Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2006), all timely filed motions to intervene and motions to intervene out-of-time filed before the issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties. Indicated Shippers (consisting of BP Energy Company, BP America Production Company, and Chevron Natural Gas, a Division of Chevron U.S.A. Inc.) filed a protest. UTOS filed an answer to the protest. Under Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 213(a)(2) (2006), answers to protests are not accepted

unless otherwise ordered by the decisional authority. The Commission will accept UTOS' answer because it further clarifies the issues.

3. UTOS proposes to replace its current *pro forma* License Agreement with a more up-to-date and thorough Website Agreement, to be utilized by the new third-party software provider, to conform to and to provide greater consistency and ease of administration with other Enbridge Inc. pipelines. In order to update its website, UTOS proposes to make the following revisions to its Tariff: (1) revise its table of contents and section 15.3 of its General Terms and Conditions (GT&C) to reflect the proposed *pro forma* Website Agreement and (2) add the proposed *pro forma* Website Agreement to its Tariff.

4. In its protest, Indicted Shippers assert, first, that the following underscored language in proposed section 8 of the Website Agreement is inappropriate:

Transporter shall operate its Interactive Internet Website in a prudent manner. Except for the negligence, fraud, or willful misconduct of Transporter, Transporter expressly disclaims liability for loss or damage resulting from SHIPPER's actions or breach of this Agreement, events of force majeure, any defects in computer software, hardware, or programming, or any interruption in or malfunction of electronic communication or transmission. SHIPPER agrees to defend, indemnify and hold harmless Transporter, its affiliates and members and their respective officers, directors, employees and agents, from and against all claims, demands, damages, losses, costs and expenses (including court costs and reasonable attorney's fees) and liabilities of any nature whatsoever (collectively referred to herein as "Liabilities") arising out of any breach of this Agreement by SHIPPER or its authorized persons, or the use of the Interactive Internet Website or the information contained therein by SHIPPER, or its authorized persons, to the extent such Liabilities are not the direct result of the negligence, fraud, or willful misconduct of Transporter. The parties hereto agree that neither party shall be liable to the other party, or its corporate parent, subsidiaries or affiliates or members for any special, punitive, exemplary, indirect or consequential damages (including, without limitation, loss of profits or business interruptions) incurred by said party arising out of or in any manner related to this Agreement, the provision and use of the Interactive Internet Website, or the information contained therein. [Emphasis added.]

Indicated Shippers argue that the above proposed underscored language will shield UTOS from special, punitive, exemplary, indirect or consequential damages (referred to collectively as indirect damages) caused by UTOS' gross negligence. Indicated

Shippers point out that the Commission has stated that it “has allowed pipelines to limit their liability for simple negligence to direct damages, so that they are only liable for indirect, consequential, incidental or punitive damages where there is gross negligence, willful misconduct or bad faith.”¹ Hence, Indicated Shippers assert that, if a pipeline acts in a grossly negligent manner, the pipeline cannot utilize its tariff to shield the pipeline from indirect damages.

5. Indicated Shippers next request that the Commission “clarify that direct damages encompasses the extra expenses and financial harm incurred by a shipper as a direct result of responding to curtailment, or to a disruption due to pipeline negligence in administering its EBB.” Indicated Shippers interprets some of those direct damages to be expenses incurred in obtaining alternative pipeline capacity and alternative gas supplies to serve the shipper’s markets as a result of a pipeline-induced disruption and extra gas and transportation expenses that a shipper incurs due to curtailment.

6. Finally, Indicated Shippers protest section 12 of the proposed Website Agreement that would allow UTOS to modify or terminate the Interactive Internet Website at any time as long as such modification or termination is not prohibited by the Commission’s regulations. Indicated Shippers are concerned that UTOS is adopting language in section 12 of the Agreement to allow UTOS to degrade or even terminate its Website without any reason and without first obtaining Commission authorization and requests that the Commission reject such language. Indicated Shippers states that UTOS’ tariff requires that the Website provide many vital functions, such as the timely disclosure of information, and that the elimination of these interactive features “would impose big burdens on shippers.”

7. In its answer, UTOS responds to Indicated Shippers’ protest to the language of section 8 of the Website Agreement which Indicated Shippers claim unjustly shields UTOS from indirect damages. UTOS explains that such language is customary in the context of commercial agreements and that the language is substantively similar in form and content to other “electronic bulletin board” *pro forma* agreements approved by the Commission. UTOS cites two letter orders issued by delegated authority as evidence of similar Commission-approved website agreement liability provisions.²

¹ Citing *Gulf States Transmission Corp.*, 114 FERC ¶ 61,006, at P5 (2006); *Entegra Gas Pipeline Inc.*, 114 FERC ¶ 61,326, at P14, 17 (2006); *Empire State Pipeline*, 116 FERC ¶ 61,074, at P171 (2006).

² Citing *Trunkline Gas Company, LLC*, Docket No. RP04-33-3-000 (July 16, 2004) (unpublished letter order); *Panhandle Eastern Pipe Line Company, LLC*, Docket No. RP04-321-000 (June 18, 2004) (unpublished letter order).

8. UTOS also asserts in its answer that Indicated Shippers have totally mischaracterized proposed section 12 of the Website Agreement. UTOS asserts that this clause prohibits a degradation or termination of the Website Agreement when prohibited by the Commission's regulations, whether or not unilateral.

9. UTOS contends that Indicated Shippers' request that the Commission clarify what would encompass direct damages is outside the scope of this proceeding and that it should be dismissed.

10. The Commission finds that, with the exceptions discussed below, UTOS' proposed *pro forma* Website Agreement is just and reasonable and consistent with Commission policy and regulations.

11. First, regarding the protested language of section 8 of the proposed Website Agreement, the Commission agrees with Indicated Shippers that Commission policy as evidenced in the cited cases, *supra* note 1, requires that the pipeline be liable for indirect damages for the pipeline's gross negligence, willful misconduct, or bad faith. Orders issued through delegated authority, like the orders UTOS cites in its answer, cannot be cited as precedent and, in any event, the cited orders did not address the subject issues and merely accepted tariff sheets for filing purposes. Accordingly, acceptance of the instant Website Agreement is subject to UTOS filing to revise section 8 to incorporate that liability standard within 15 days of this order.

12. We reject Indicated Shippers' request that the Commission clarify the scope of direct damages. The Commission has expressed the view that the distinction between direct and indirect damages is for the courts to resolve³ and recently declined to limit the scope of direct damages.⁴

13. Finally, regarding section 12 of the proposed Website Agreement, while we agree with UTOS that the language of the proposal would not permit it to unilaterally terminate its website, as that would violate Commission regulation section 284.13, 18 C.F.R. § 284.13 (2006), we find that the language should be clarified and revised to include reference to its tariff. Accordingly, UTOS is directed to refile within 15 days of this order to revise section 12 as provided in the following underscored language to state that modification or termination of its website are authorized so long as they are "not prohibited by or inconsistent with the regulations of the Federal Energy Regulatory Commission or Transporter's FERC gas tariff. Any such modification or

³ *Midwest Indep. Transmission Sys. Operator, Inc.*, 110 FERC ¶ 61,164, at P 35 (2005).

⁴ *Entegra Gas Pipeline Inc.*, 114 FERC ¶ 61,326, at P65 (2006).

termination of its website is to be filed with and is subject to review by the Federal Energy Regulatory Commission.”

14. Accordingly, the Commission will accept the proposed tariff sheets and permit them to take effect on August 31, 2006, subject to the conditions of this order, and subject to further Commission action.

By direction of the Commission.

Magalie R. Salas,
Secretary.

Enbridge Offshore Pipeline (UTOS) LLC
Fifth Revised Volume No. 1

Tariff Sheets Conditionally Accepted
Effective August 31, 2006

Second Revised Sheet No. 162

First Revised Sheet No. 326

First Revised Sheet No. 327

First Revised Sheet No. 328

First Revised Sheet No. 329

First Revised Sheet No. 330

First Revised Sheet No. 331

Original Sheet No. 332

Original Sheet No. 333

Original Sheet No. 334

Original Sheet No. 335